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Supreme Court of the United States.

OCTOBER TERM, 1902.

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JAMES H. McKENNEY,
Clerk.

No. 661.

WHITAKER WRIGHT, APPELLANT,

vs.

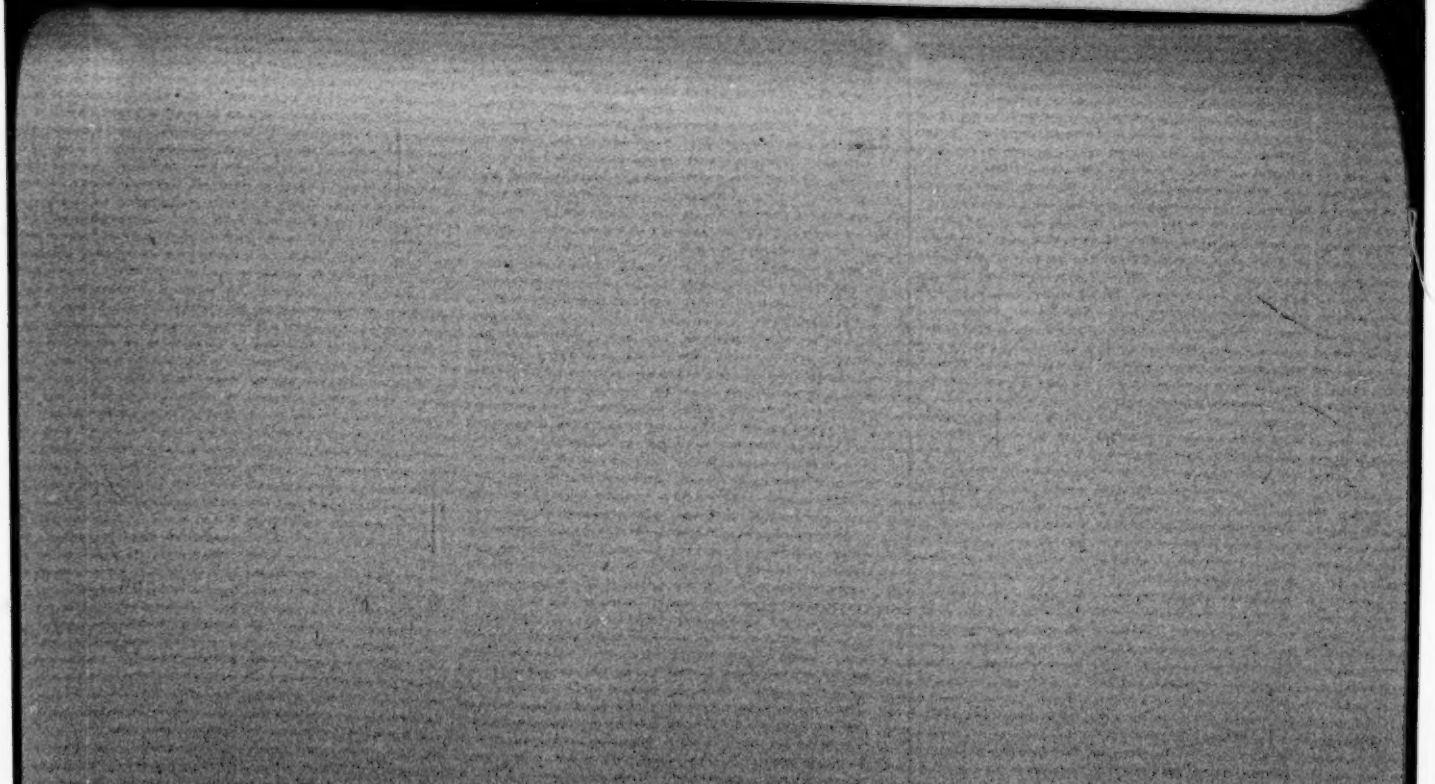
WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

BRIEF FOR H. B. M. CONSUL GENERAL AT NEW YORK, APPELLEE.

ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING WRITS OF HABEAS CORPUS AND CERTIORARI.

CHARLES FOX,
Of Counsel for Appellee, H. B. M. C. General.

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Brief for H. B. M. Consul General at New York, Appellee.

ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING WRITS OF HABEAS CORPUS AND CERTIORARI.

STATEMENT.

Proceedings for the extradition of the appellant were instituted by the appellee under the supplementary treaty between the United States and Great Britain (26 U. S. Statutes at Large, p. 1508), before Commissioner Alexander, an United States commissioner and also a commissioner especially ap-

pointed to act in extradition proceedings, for the extradition of the appellant for an offense charged as fraud as a director of a company, being embodied within subdivision 4 of article I of the said supplementary treaty, which reads, "Fraud "by a bailee, banker, agent, factor, trustee or director, or "member or officer of any company, made criminal by the "laws of both countries."

The complaint (p. 8) upon which the warrant of apprehension of the appellant was issued charges him with, in the month of October, 1899, and in the month of December, 1900, within the jurisdiction of the demanding government, then being a director of a certain body corporate, to wit, the London and Globe Finance Corporation, unlawfully making, circulating, and publishing certain reports and statements of account of the said corporation which were false, he then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation; that the appellant was a fugitive from the justice of the demanding government, and was then within the territory of the United States; that the crime of which he was in the complaint charged was an offense within the treaty between the United States and Great Britain, and that a warrant had been issued in England for the apprehension of the appellant for the offense charged. This complaint was made upon information and belief, and the appellee states that his information and belief are based upon messages received by cable from His Majesty's Secretary of State for Foreign Affairs and directing the appellee to apply for a provisional warrant under the treaty for extradition between the United States and Great Britain. This complaint was sworn to before Commissioner Alexander on

the 16th day of March, 1903, the appellant having arrived at the port of New York from France the day before (Sunday), and the complainant states that he has cabled to the Foreign Secretary of his government for fuller details as to the crime, and that, in order that the appellant might be detained pending the arrival of such information, a provisional warrant was asked for.

A warrant upon this complaint was issued, the appellant arraigned, and an adjournment taken to March 18.

On March 17 a new complaint was prepared, giving with greater detail the facts constituting the offense charged against the appellant, and a warrant upon this complaint was issued, but was never executed, owing to the illness of the defendant.

Upon the 18th day of March, the time to which the proceedings had been adjourned, the appellant was unable to attend, owing to illness, and his counsel moved to dismiss the complaint upon the ground of its insufficiency, and also made a motion for his enlargement on bail (p. 10). The motion for the dismissal of the complaint was denied at the time it was made, and the motion to admit to bail was held by the commissioner for further consideration, and on March 20th he denied the application on the ground of want of power (p. 10).

The appellant's illness being reported to the appellee to be continued, the warrant obtained on March 17 was not executed before the writs of *habeas corpus* and *certiorari* were obtained (p. 6). Pending the disposition of these writs, the warrant of March 17th could not legally be executed, and after the hearing and decision by the United States Circuit Court an order was entered on March 30 dismissing the writs and

remanding the appellant to the custody of the United States Marshal (p. 13).

On March 31, a new complaint was made and sworn to before Commissioner Alexander, including not only the facts constituting the offense as stated in the complaint of March 16, but additional facts; and presented with and accompanying the complaint were the information and complaint and depositions upon which the warrant referred to in the complaint of March 16 was issued, and also a copy of the warrant itself, all of these papers being duly certified under the act of Congress of August 3, 1882.

Upon this complaint a warrant was issued, and the proceedings having been adjourned to that day, an announcement was made on behalf of the appellee that he would abandon further proceedings under the complaint of March 16 and consent to the discharge of the prisoner from arrest under the warrant of March 16 and proceed under the complaint of March 31.

The commissioner held that, as the proceedings under the warrant of March 16 had been carried into the circuit court by a writ of *certiorari*, he was without power to discharge the prisoner under such warrant.

On behalf of the appellee the commissioner was notified that an order had been entered the day before, on March 30, dismissing the writs of *certiorari* and *habeas corpus* and remanding the prisoner to the custody of the marshal.

Counsel for the appellant then stated that papers were then being prepared on behalf of the appellant for the purpose of removing the case to this court, and that an application was to be made to advance the cause to a speedy hearing. Upon this statement the commissioner held that, pending

such proceedings, he was without power so dismiss the complaint of March 16 and discharge the prisoner.

The appellant was arrested under the warrant issued under the complaint of March 31. The further hearing was adjourned to April 8. On that day counsel for the appellant stated that an appeal had been allowed to this court, whereby the questions involved on the hearing on the writ of *habeas corpus* and on the *certiorari* proceedings were to be reviewed by this court; that citation had been duly issued and served, and that a motion would be made, returnable in this court on the 13th day of April, for a rule or order advancing the cause and setting it down for a prompt hearing.

Counsel for the demanding government renewed his motion for the discharge of the appellant under the complaint of March 16, and repeated his former announcement that the demanding government would not proceed further under that warrant or complaint.

The motion to discharge the appellant under the warrant of March 16 was again denied, for the claimed lack of power on the part of the commissioner, and the commissioner stated: "In view of the position of counsel for the prisoner, "and the waiver by them of any objections to proceeding, "by reason of the pendency of the proceedings under the "writ of error, the demanding government should proceed "with its case under the complaint of March 31." Under this ruling the demanding government has introduced evidence in support of the charges referred to in that complaint.

The complaint of March 16 and the proceedings thereunder are no longer sought to be continued by the demanding government. The warrant of March 16 was intended

to be simply, as stated in the complaint, a provisional warrant, to obtain the apprehension of the appellant and to prevent his escape. The only proceedings under which the demanding government seeks the extradition of the appellant are those that were instituted by the complaint of March 31. A motion to admit the appellant to bail has been made in the proceedings under the complaint of March 31, and denied by the commissioner for want of power.

The motion before the commissioner for a dismissal of the complaint of March 16 was made upon the ground that the complaint did not state that the offense charged was made criminal by the laws of both countries, although before the motion was made it was stated to counsel that the laws which were claimed by the demanding government to make the offense criminal by the laws of both countries were sections 83 and 84 of chapter 96, 24 and 25 Victoria, and subdivision 3 of section 611 of the New York Code of Civil Procedure.

We submit that, the demanding government having abandoned all proceedings under the complaint and warrant of March 16, they should no longer be considered as pending; but if it be held that for the purposes of this appeal those proceedings are still in existence, we will proceed to treat the questions as though no subsequent complaint had been made or warrant obtained.

POINTS.

I.

NO EXAMINATION HAVING BEEN COMMENCED PRIOR TO THE PROCEEDINGS ON HABEAS CORPUS NOW HERE FOR REVIEW, THIS COURT WILL CONFINE ITS INQUIRY TO THE QUESTION OF JURISDICTION OF THE COMMISSIONER.

Terlinda *vs.* Ames, 184 U. S., 270.

In this case the court says:

"The settled rule is that the writ of *habeas corpus* cannot "perform the office of a writ of error, and that, in extradi- "tion proceedings, if the committing magistrate has juris- "diction of the subject-matter and of the accused, and the "offense charged is within the terms of the treaty of extra- "dition, and the magistrate, in arriving at a decision to "hold the accused, has before him competent legal evidence "on which to exercise his judgment as to whether the facts "are sufficient to establish the criminality of the accused for "the purposes of extradition, such decision cannot be re- "viewed on *habeas corpus* (Ornelas *vs.* Ruiz, 161 U. S., 502, "508, and cases cited; Bryant *vs.* United States, 167 U. S., "104).

"The statute in respect of extradition gives no right of "review to be exercised by any court or judicial officer, and "what cannot be done directly cannot be done indirectly "through the writ of *habeas corpus*. The court issuing the "writ may, however, 'inquire and adjudge whether the "'commissioner acquired jurisdiction of the matter, by con-

"'forming to the requirements of the treaty and the stat-
"'ute; whether he exceeded his jurisdiction; and whether
"'he had any legal or competent evidence of facts before
"'him, on which to exercise a judgment as to the crim-
"'inality of the accused. But such court is not to inquire
"'whether the legal evidence of facts before the commis-
"'sioner was sufficient or insufficient to warrant his con-
"'clusion.' Blatchford, J., *In re* Stupp, 12 Blatch., 501;
"Ornelas *vs.* Ruiz, 161 U. S., 508."

II.

THE COMMISSIONER HAD JURISDICTION TO ISSUE THE WARRANT UPON THE COMPLAINT MADE BY THE APPELLEE.

So much of section 5270 of the U. S. Revised Statutes as is applicable to the proceedings for the extradition of the appellant reads as follows:

"Whenever there is a treaty or convention for extradition
"between the Government of the United States and any for-
"eign government, any justice of the Supreme Court, circuit
"judge, district judge, commissioner, authorized so to do by
"any of the courts of the United States, or judge of a court
"of record of general jurisdiction of any State, may, upon
"complaint made under oath, charging any person found
"within the limits of any State, district, or Territory,
"with having committed within the jurisdiction of any
"such foreign government any of the crimes provided
"for by such treaty or convention, issue his war-
"rant for the apprehension of the person so charged,
"that he may be brought before such justice, judge or com-

"missioner, to the end that the evidence of criminality may "be heard and considered. If, on such hearing, he deems "the evidence sufficient to sustain the charge under the pro- "visions of the proper treaty or convention, he shall certify "the same, together with a copy of all the testimony taken "before him, to the Secretary of State, that a warrant may "issue upon the requisition of the proper authorities of such "foreign government, for the surrender of such person, ac- "cording to the stipulations of the treaty or convention; and "he shall issue his warrant for the commitment of the per- "son so charged to the proper jail, there to remain until such "surrender shall be made."

The complaint, under oath (p. 4), charged the accused, while a director of a corporation, with having, at times and at places mentioned, within the jurisdiction of the demanding government, committed the crime of fraud, as a director of a named company, in unlawfully making, circulating, and publishing certain reports and statements of account of the said corporation, which were false, and which at the time the appellant knew were false, with intent thereby to deceive and defraud stockholders or members of the said company.

The crime of fraud as director of a company is one of the offenses enumerated in the supplementary treaty, which must be made criminal by the laws of both countries. It was not necessary to state or refer by chapter or section to the laws of the foreign country or to the laws of this country in the complaint. That was a matter of proof in the course of the examination and need not of necessity be included in the complaint. The complaint contained the statement that the crime charged was an offense within the treaty, and that

statement includes and carries with it without specific statement to this effect that this offense is made criminal by the laws of both countries. If it was not made criminal by the laws of both countries, then it was not within the treaty. The complaint does state, however, that a warrant had been issued in England for the apprehension of the accused for the offense charged, and this was certainly equivalent to any statement that could have been made in the complaint that it was an offense that was made criminal by the laws of England, as no warrant could have been issued except for an offense that was criminal by the laws of England. As the court will take judicial notice of the laws of this country, it was not therefore necessary in the complaint to refer to the particular laws of this country.

A complaint in an extradition case need not be as precise, technical, and formal as an indictment. It is sufficient if it appears that a treaty offense is meant to be charged.

Rice *vs.* Ames, 180 U. S., 371.
Re Roth, 15 Fed. Rep., 507.
Re Farez, 7 Blatch., 48.
Re Sterneman, 77 Fed. Rep., 576.
Re Heinrich, 5 Blatch., 414, 460.

All that is required is to set forth clearly the substance of the offense charged, so that the court can see that one or more particular crimes enumerated in the treaty are alleged to have been committed.

Re Adutt, 55 Fed. Rep., 376.
Re Grin, 112 *id.*, 790.

III.

THE COMPLAINT COULD BE MADE UPON INFORMATION AND BELIEF.

The appellee stated in his complaint the basis of his information and belief; that he was the representative of the demanding government, and that the sources of his information were messages received from the foreign secretary of his government. As was said in *In re* Sterneman, *supra*, "the "complaint may in some instances be upon information and "belief. The exigencies may be such that the criminal may "escape punishment unless he is promptly apprehended by the "representatives of the country whose law he has violated."

Complaints made upon information and belief were sustained in *Re* Farez, 7 Blatch., 343; *Re* Kane, 6 Fed. Rep., 34.

In Rice *vs.* Ames, *supra*, Mr. Justice Brown, in delivering the opinion of the court, says: "We do not wish, however, "to be understood as holding that in extradition proceedings "the complaint must be sworn to by persons having actual "knowledge of the offense charged. This would defeat the "whole object of the treaty, as we are bound to assume that "no foreign government possesses greater power than ours to "order its citizens to go to another country to institute legal "proceedings. This is obviously impossible."

We do not understand a complaint upon information and belief to be condemned under the last-cited case, provided the sources of the information and the grounds of the belief are shown and it appears that they justify the statements contained in the complaint.

IV.

THE OFFENSE CHARGED IN THE COMPLAINT IS MADE CRIMINAL BY THE LAWS OF BOTH COUNTRIES.

GREAT BRITAIN.

Chapter 96 of 24 and 25 Victoria, sections 83 and 84, which are as follows:

83. "Whosoever, being a director, manager, public officer, "or member of any body corporate or public company, shall, "with intent to defraud, destroy, alter, mutilate, or falsify any "book, paper, writing, or valuable security belonging to the "body corporate or public company, or make or concur in the "making of any false entry, or omit or concur in omitting "any material particular, in any book of account or other "document shall be guilty of a misdemeanor, and being con- "victed thereof shall be liable, at the discretion of the court "to any of the punishments which the court may award as "hereinbefore last mentioned."

84. "Whosoever being a director, manager, or public officer "of any body corporate or public company shall make, circu- "late, or publish or concur in making, circulating, or publish- "ing any written statement or account which he shall know "to be false in any material particular, with intent to deceive "or defraud any member, shareholder, or creditor of such "body corporate or public company, or with intent to induce "any person to become a shareholder or partner therein, or to "intrust or advance any property to such body corporate or "public company, or to enter into any security for the benefit "thereof, shall be guilty of a misdemeanor, and, being con-

"victed thereof, shall be liable, at the discretion of the court, "to any of the punishments which the court may award, as "hereinbefore last mentioned."

Companies Act of 1862, 25 & 26 Vict., chapt. 89, s. 166.

"If any director, officer, or contributory of any company "wound up under this act destroys, mutilates, alters or falsi- "fies any books, papers, writings, or securities, or makes or is "privy to the making of any false or fraudulent entry in "any register, book of account or any other document be- "longing to the company with intent to defraud or deceive "any person, every person so offending shall be deemed to "be guilty of a misdemeanor, and upon being convicted "shall be liable to imprisonment for any term not exceeding "two years, with or without hard labour."

UNITED STATES.

Section 5209 of the United States Revised Statutes reads: "Every president, director, cashier, teller, clerk or agent of "any association, who embezzles, abstracts or wilfully mis- "applies any of the moneys, funds or credits of the associa- "tion, or who, without authority from the directors, issues "or puts in circulation any of the notes of the association, "or who, without such authority, issues or puts forth any "certificate of deposit, draws any order or bill of exchange, "makes any acceptance, signs any note, bond, draft, bill of "exchange, mortgage, judgment or decree, or who makes "any false entry in any book, report or statement of the asso- "ciation, with intent, in either case, to injure or defraud the "association or any other company, body politic or cor-

"porate, or any individual person, or to deceive any officer "of the association, or any agent appointed to examine the "affairs of any such association; and every person who, "with like intent, aids or abets any officer, clerk or agent "in any violation of this section shall be declared guilty of "a misdemeanor, and shall be imprisoned not less than five "years nor more than ten."

This section applies to and is under the title of national banks, which are the only private corporations that come under the laws of the United States.

The 10th article of the treaty between the United States and Great Britain (8 U. S. Stat. at Large, p. 576) reads as follows:

"Art. 10. It is agreed that the United States and her "Britannic Majesty shall, upon mutual requisitions by them, "or their ministers, officers or authorities, respectively made, "deliver up to justice, all persons who, being charged with "the crime of murder, or assault with intent to commit mur- "der, or piracy, or arson, or robbery, or forgery, or the utter- "ance of forged paper, committed within the jurisdiction of "either, shall seek an asylum, or shall be found within the "territories of the other; provided, that this shall only "be done upon such evidence of criminalities, accord- "ing to the laws of the place where the fugitive or "person so charged, shall be found, would justify his "apprehension and commitment for trial, if the crime "or offense had there been committed; and the respective "judges and other magistrates of the two governments shall "have the power, jurisdiction, and authority, upon complaint "made under oath, to issue a warrant for the apprehension "of the fugitive or person so charged, that he may be brought

"before such judges or other magistrates, respectively, to the "end that the evidence of criminality may be heard and con- "sidered; and if, on such hearing, the evidence be deemed "sufficient to sustain the charge it shall be the duty of the "examining judge or magistrate, to certify the same to the "proper executive authority, that a warrant may issue for "the surrender of such fugitive. The expense of such ap- "prehension and delivery shall be borne and defrayed by "the party who makes the requisition, and receives the "fugitive."

It will be seen that the surrender "shall only be done "upon such evidence of criminality as, according to the "laws of the place where the fugitive or person so charged "shall be found, would justify his apprehension and com- "mitment for trial if the crime or offense had been there "committed."

It has been held, but does not yet seem to have had the approval of this court (although it was presented in Grin vs. Shine, 187 U. S., 181), that this treaty, by its terms, determines and defines upon what evidence surrender shall be granted, viz., upon such evidence of criminality as, according to the place—that is, so far as this particular proceeding is concerned, the State of New York—would justify the apprehension and commitment for trial if the offense had been there committed.

In support of the view that the laws of New York, after having established the laws of England, are to govern this proceeding, we refer to volume 4, Opinions of the United States Attorney General, 330.

Re Farez, 7 Blatch., 357.

Re Wadge, 15 Fed. Rep., 865.

Re Clarkson, 34 Fed. Rep., 533.

In re Farez, *supra*, the accused was charged with the crime of forgery, under the treaty between Switzerland and the United States (11 U. S. Stat. at Large, 593 and 594). Judge Blatchford in that case says: "The 13th article of that treaty "provides that the person charged with the crime shall be "delivered up only when the fact of the commission of the "crime shall be so established as to justify his appre- "hension and commitment for trial, if the crime had been "committed in the country where such person shall be "found. Applied to this case, this provision requires "that in order to warrant the commitment of the party "for trial, the same evidence shall be required of the "fact of the commission of the crime in Switzerland, as "would be required of the fact of the commission of the like "crime if it had been committed here. The good sense of "this provision requires, that the fact of the commission of "the crime shall be established in such manner and accord- "ing to such forms of proceedings as would be required, if "the crime had been committed in the country where the "person shall be found.

"The word 'country' necessarily, under our form of gov- "ernment, in carrying out the provision of the convention, "means the special political jurisdiction that has cognizance "of the crime."

Under the British extradition act of 1870 (33 and 34 Viet., c. 52), providing for the surrender of fugitives to foreign States, the first schedule provides "that the following list of "crimes is to be construed according to the law existing in "England or in a British possession (as the case may be) of "the date of the alleged crime, whether by common law or "by statute made before or after the passing of this act.

* * * * * * *

36485

"Fraud by a bailee, banker, agent, factor, trustee, or a "director or member or public officer of any company, made "criminal by an act for the time being in force."

The contention made on behalf of the appellant is that there is no law of the United States which makes an offense similar to that alleged to have been committed by the appellant a crime. We submit that section 5209 of the United States Revised Statutes shows that acts similar to those charged against the appellant if committed by a director of a national bank would be a crime; but this subdivision 4 of article I of the supplementary treaty of 1889 also includes fraud by a bailee, banker, agent, factor, and trustee, made criminal by the laws of both countries, and as it must be conceded that there is no law of the General Government of the United States that makes such offenses last named criminal, it requires a determination of the intention of the high contracting parties when entering into this treaty. In respect to these offenses it must be assumed that the distinguished representatives of their respective countries who concluded this treaty were well aware that there was no general law of the United States covering these offenses except the one cited in respect to national banks. What was their intention in making this provision? When they referred to the laws of both countries, did they mean that it should simply apply to the statute laws of Great Britain and the laws contained in the statutes of the United States? Can it be assumed, in considering the purposes of this treaty and the character of the offenses referred to in this subdivision, that they intended to restrict it or make it subject to such a narrow construction as the appellant would have applied to it? Can it be suggested that the

Government of the United States entered into this treaty, so far as the particular offenses in this subdivision are concerned, knowing that it could not carry it out by reason of the absence of a general law of the United States made applicable to them, and that it could not enforce this provision of the treaty by reason thereof? What must be considered to be the object of this treaty was to give all the States, dominions, colonies, or possessions forming a part of the countries of the high contracting parties an opportunity to obtain the extradition of a person committing one of these crimes who was found within the jurisdiction of any State, dominion, colony, or possession of the other; the fact, however, to appear before surrender that the offense charged against any one of these particular classes of offenders should be a crime in the country, or State, dominion, colony, or possession thereof that he has fled from, and also in the country, or the State, dominion, colony, or possession thereof in whose jurisdiction he is found.

A treaty is to be interpreted liberally and in such manner as to carry out its manifest purpose.

Tucker *vs.* Alexandra, 183 U. S. R., 424.

Treaties of every kind are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and force of reasoning which we apply to the interpretation of private contracts (vol. I, Kent's Comm., 174).

In Grin *vs.* Shine, decided on December 1, 1902, and reported in 187 U. S. R. (advance sheets), page 181, it is held

that, "treaties of extradition should be faithfully observed and "interpreted with a view to fulfill our just obligations to other "powers, without sacrificing the legal or constitutional rights "of the accused, and that in the construction and carrying "out of such treaties the ordinary technicalities of criminal "proceedings are applicable only to a limited extent. The "foreign powers are not expected to be versed in the niceties "of our criminal laws, and proceedings for a surrender are "not such as put in issue the life or liberty of the accused. "They simply demand of him that he shall do what all good "citizens are required and ought to be willing to do, viz., sub-"mit themselves to the laws of their country; and where the "proceeding is manifestly taken in good faith, a technical "non-compliance with some formality of criminal procedure "should not be allowed to stand in the way of a faithful dis-"charge of our obligations. Presumably, at least, no injustice "is contemplated, and a proceeding which may have the effect "of relieving the country from the presence of one who is "likely to threaten the peace and good order of the commu-"nity is rather to be welcomed than discouraged."

Under the laws of the State of New York, where the appellant was found and apprehended, the offense charged is a crime, the same as in England, and we contend that we have the right to hold him in these extradition proceedings, under this treaty, the law of the State of New York being a law of this country. (Opinion, *Lacombe*, J., p. 11.)

The Penal Code, section 611, provides: "A director, agent "or employee of any corporation or joint stock association "who * * * (3) knowingly concurs in making or pub-"lishing any written report, exhibit or statement of its af-

" fairs or pecuniary condition, containing any material state-
" ment which is false * * * is guilty of a misdemeanor."

Subdivision 4 of article I of the supplementary treaty of 1889 was intended to embrace within it certain crimes which, by the laws of the two countries, might not be called under the same name, so that every fraud committed by any of the persons within that subdivision, which was a crime under the laws of both countries, should come within that provision.

In a number of treaties between Great Britain and other countries, copies of them being contained in and appended to Clarke on Extradition, 1888, this provision, " made criminal by the laws of both countries," is contained.

These words, " made criminal by the laws of both countries," as applicable to extradition treaties, have received the construction of courts in Great Britain.

In *Re* Arton, No. 2, volume I, Q. B. D., 1896, the prisoner had been committed under the treaty between Great Britain and France for a number of offenses within the treaty, and among them one offense described as " faux en ecritures de commerce " (falsification of accounts), and a committal was made upon the argument of a writ of *habeas corpus*, that under the law of England the accused was not guilty of forgery; that the falsification was not in the order of committal described as committed by Arton as a director, officer, or member of a public company, or as a clerk, officer, or servant, which would be necessary to constitute falsification a crime according to English law; and that, even if the order of committal were amended in this respect, he could not properly be committed for falsification on the ground that such falsification was not a forgery under the English law. The court held that if the acts of

the accused established a crime under the laws of both countries and within the treaty for extradition, it was not necessary that such crime should be called by the same name or under the same head. It was sufficient if it be a crime under the laws of both countries and within the treaty; and that treaties ought to receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object, and intent.

The same construction of the treaty between Great Britain and France, that a crime need not bear the same name to bring it within the treaty, if it was criminal by the laws of both countries, was also held in *Re* Bellecontre, 17 Cox, C. C., 253, and *Ex parte* Piot, 15 Cox, C. C., 208.

Re Windsor, 6 Best & S., 522, upon which the appellant lays stress, does not justify the conclusion he seeks to have reached here, that by reason of the decision in that case the appellant cannot be extradited. What the learned justices in that case held was that the evidence did not show the crime of forgery under the laws of England, or under the general laws of the United States, and that, although the facts might, by the laws of New York, be defined as forgery, it did not make it so under the laws applicable to common-law forgery; and the court substantially held that, as the crime charged was not a forgery when the treaty of 1842 was entered into, it could not be brought within the treaty by a subsequent statutory law of a particular State of this country. The error which the learned justices in that case apparently fell into was that there was a general law of the United States covering the crime of forgery. We know that this is not so, and never has been; that the laws of the particular

State define what are crimes within their particular jurisdictions.

In Benson *vs.* McMahon, 127 U. S. R., 457, it is stated, "This court has frequently decided there are no common-"law crimes of the United States. In very few of the States "are there common-law crimes remaining as subject of "punishment at the time when this treaty was made. "Most every State in the Union has recast her criminal law "by the enactment of statutes in such a mode that the com-"mon law is now only appealed to as an aid to the defini-"tion of crime."

In Moore on Extradition, section 430, extradition cases in Canada are referred to, where surrender was sought to the United States for crimes of forgery, and the case of *Re* Windsor, *supra*, was endeavored to be used as an authority to prevent the surrender of fugitives to the United States. It was stated by the Canadian courts that an attentive reading of *Re* Windsor must assure every one that the learned justices who decided it did not have their attention called to the fact that under the Constitution of the United States there could be no Federal law against the crime in that case charged.

The case of Windsor differs very much from the case at bar. Giving that case the construction that the appellant would have it bear, it simply holds that the facts alleged did not constitute forgery according to British laws, and there was no evidence that they constituted the crime of forgery, for which crime alone extradition could be demanded, in any State, except that of New York.

In the case at bar, we show that the crime charged is made criminal by the laws of England, by the Revised Statutes of

the United States, and also by the laws of the State of New York, the place where the accused is found. It is also a crime under the laws of many other States of the Union. Suppose that the position was reversed, that the appellant had been apprehended in England for a violation of subdivision 3, section 611, New York Penal Code, and his extradition asked, would not the Government of the United States be entitled to his surrender under 24 and 25 Victoria, chapter 96, sections 83, 84, and the extradition act of 1870, *supra?*

V.

THE PLAINTIFF HAS NO RIGHT OF ASYLUM IN THIS COUNTRY.

The treaties of extradition to which the United States is a party do not guarantee a fugitive from the justice of one of the countries an asylum in the other. They only make provision that for certain crimes he shall be deprived of that asylum and surrendered to justice, and they prescribe the mode in which this shall be done.

Kerr *vs.* State of Illinois, 119 U. S., 436.

In Grin *vs.* Shine, *supra*, the court said: "We are not "prepared, however, to yield our assent to the suggestion, "that treaties of extradition are invasions of the right of "political habitation within our territory or that every in- "tendment in proceedings to carry out these treaties shall "be in favor of the party accused. Such treaties are rather "exceptions to the general right of political asylum, and an "extension of our immigration laws prohibiting the intro-

"duction of persons convicted of crime (18 Stat. at L., 477, "chap. 141), by providing for their deportation and return to "their own country even before conviction, when surrender "is demanded in the interest of public justice."

VI.

THAT THE APPELLANT IS A CITIZEN OF THE UNITED STATES GIVES HIM NO IMMUNITY TO COMMIT CRIMES IN OTHER COUNTRIES, AND DOES NOT PREVENT HIS SURRENDER UNDER A TREATY OF EXTRADITION, WHICH MAKES NO EXCEPTION IN FAVOR OF SUBJECTS OF THE SURRENDERING COUNTRY.

Neely *vs.* Henkel, 180 U. S., 123.

Moore on Extradition, sec. 138.

Executive Documents of the United States, No. 156, 1884.

VII.

THE APPELLANT IS NOT ENTITLED TO BE DISCHARGED FROM CUSTODY BY REASON OF THE INSUFFICIENCY OF THE COMPLAINT BEFORE THE COURT.

Another complaint has been made, remedying the defects claimed to exist in the first, and this court will not discharge the appellant from all arrest for the crime charged in the complaint. The object of a writ of *habeas corpus* is to ascertain whether the prisoner applying for it can be legally detained in custody, and if sufficient ground for his detention is shown he is not to be discharged for defects in the original arrest or commitment.

Nishimura Ekiu *vs.* U. S., 142 U. S., 651.

Iasigi *vs.* Van De Carr, 166 U. S., 392.

The arrest on the second warrant, under the new complaint, was not illegal.

Re McDonnell, 11 Blatch., 170.

VIII.

THE APPELLANT IS NOT ENTITLED TO BE ENLARGED ON BAIL, UNDER ANY RULE OF LAW OF THE UNITED STATES.

This matter, however, seems to us to concern the Government of the United States, as it has agreed to surrender and deliver to the demanding government the appellant, providing the requirements of the treaty and the laws of this country are complied with.

The Attorney General having advised us that intervention on behalf the United States on this appeal would be made, we might safely leave the argument of the questions involved herein to him, as they will be fully covered. We beg leave, however, to make certain suggestions in respect to this matter of bail.

At the outset we will refer to the case of Queen *vs.* Spilsbury, 1899, 2 Q. B. D., 615, which was cited by the appellant in the court below. This case was not an international extradition case, but came within what is called the fugitive offenders' act, which law is limited to the apprehension of offenders who have committed crimes and been found within the dominions of Great Britain, similar to our interstate rendition laws. The court there did hold that it had the common-law right to admit to bail, but, exercising that right, it being discretionary under the common law whether

to admit to bail or not, it denied the application to discharge the accused on bail.

We have not been able to find any case reported in England where bail in an international extradition case was permitted, and the extradition act of Great Britain does not make any provision for bail.

It cannot, we submit, be contended that the courts of the United States have retained or have any rights at common law to enlarge upon bail. The statutes of the United States cover all cases where bail is allowable, and the claim or exercise of any right at common law has been made unnecessary by virtue of these statutes, and common-law bail is therefore at the present time unknown and the right thereto conferred and limited by statute.

Section 1015 of the United States Revised Statutes provides as follows: "Bail shall be admitted upon all arrests "in criminal cases where the offense is not punishable by "death, and in such cases it may be taken by any of the per- "sons authorized by the preceding section to arrest and im- "prison offenders."

The preceding section of the United States Revised Statutes provides:

"For any crime or offense against the United States, the "offender may, by any justice or judge of the United States, "or by any commissioner of a circuit court, to take bail, or "by any chancellor, judge of a supreme or superior court, "chief or first judge of common pleas, mayor of a city, jus- "tice of the peace or other magistrate of any State where he "may be found, and agreeably to the usual mode of process "against offenders in such State, and at the expense of the "United States be arrested or imprisoned or bailed as the

"case may be for trial before such court of the United "States as by law has cognizance of the offense * * *."

The remainder of section 1014 has no bearing upon the question before the court, but applies to the return of process, recognizance of the witnesses, and the removal of the offender from the place where apprehended to the place of trial.

Sections 1014 and 1015 must be read together on this question, and when in section 1015 it is stated "bail shall be admitted upon all arrests in criminal cases" by the persons authorized by the preceding section to arrest and imprison offenders, it was intended to apply, and was limited in its application, to arrests in criminal cases for any crime or offense against the United States.

Sections 1014 and 1015 were contained before revision in one section of the statutes, section 33, judiciary act, volume 1, United States Statutes at Large, page 91, and in chapter 22 of the acts of the second Congress (1 Stat. at Large, 334).

It is clear that bail is only authorized under the Revised Statutes where the offense is against the laws of the United States, and bail is for his appearance in the courts of the United States or before committing magistrates.

This proceeding is not against an offender of the laws of the United States. While criminal in its nature, it is not a criminal case, under the laws of the United States, but rather a quasi-criminal proceeding under a treaty and special statutes of the United States for the apprehension and surrender of a fugitive from justice, upon the fulfillment of certain conditions required by the terms of the treaty and the law.

There appears to be one case reported where this matter of bail in international extradition cases was determined, and that is in the *Matter of Carrier, 57 Fed. Rep., 578*, where it was held that the matter of admitting to bail was not a question of practice; that it had been regulated by statute, and that bail is not allowed in any case except in pursuance of some statute; that although the United States Revised Statutes in respect to procedure in extradition did not forbid bail in such cases, this was not enough, the authority should be expressed in the law itself, and that as there was not in the act any provision for bail, none could be permitted.

Section 5270 of the Revised Statutes clearly implies that no bail is to be allowed, for upon his commitment for surrender by the commissioner he shall commit him "to the "proper jail, there to remain until such surrender shall be "made."

The right to bail is negatived by implication, in that no affirmative right to bail is given by statute or the statute governing extradition.

The difficulty with permitting bail in these matters has been apparently understood by the law-makers.

The treaty provides that any person found within the jurisdiction of either of the high contracting parties charged with a crime, within the treaty, committed within the jurisdiction of the one making the demand, who shall be apprehended in the territory of the other, upon the complaint under oath stating the jurisdictional facts, and that a hearing shall be had, and if the evidence is deemed sufficient, it is to be certified as required and a warrant is to be issued for the surrender of the accused.

37489

What each government contracts to do is to surrender any person for whom a warrant of surrender is issued.

Take this case as an illustration of what the permission of bail might mean. The accused is admitted to bail. The proceedings result in a warrant of surrender. At this time the accused has fled. The United States Government is unable to fulfill its obligation under the treaty to surrender the accused, and that is just what in the matter of bail in extradition cases would be the difficulty, that the Government might be placed in a position that would make it unable to comply with the treaty provisions. As a matter of query: To whom should the undertaking for bail run? There is no provision of law for it. If bail is forfeited, who is to enforce the bond? Who is to attempt to regain custody of the accused? When the demanding government has done all the treaty and law requires of it in the proceedings, it is entitled to the delivery of the accused upon the issuing of a warrant of surrender.

The laws of the United States never contemplated any provision whereby there should be a possibility of a miscarriage of the provisions of the treaty, and have carefully refrained from permitting a nullification of the treaty in a particular case by a release on bail and escape.

Bail in interstate rendition cases is taken by virtue of the statutes. Where no statute existed it has been held that bail could not be taken.

IX.

IT WAS NOT NECESSARY THAT A WARRANT SHOULD HAVE ISSUED OR AN INDICTMENT HAD BEFORE THE COMMENCEMENT OF THESE PROCEEDINGS.

Grin *v.* Shine, *supra.*

Re Farez, *supra.*

X.

THE ORDER OF THE CIRCUIT COURT SHOULD BE AFFIRMED.

CHARLES FOX,

Of Counsel for Appellee, H. B. M. C. General.